River City Elevator Co., Inc. *and* International Union of Elevator Constructors. Cases 25–CA–27125–1 and 25–RC–9901

July 11, 2003

SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On March 12, 2001, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding, finding that the Employer had violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain and to provide information following the Union's certification, in Case 25–RC–9901, as the exclusive representative of the employees in the appropriate unit. The Board ordered the Respondent to recognize and bargain with the Union.

Thereafter, the Employer petitioned the United States Court of Appeals for the Seventh Circuit for review of the Board's Order, and the Board filed a cross-application for enforcement. The Employer argued that the Board had erred in overruling objections to the election that resulted in the Union's certification. (The tally of ballots was 4 for representation, and 3 against.) On May 13, 2002, the court issued its opinion[2] denying enforcement of the Board's Order. Specifically, the court held that the Union's preelection offer of mechanic's cards to all unit employees, whether or not they had completed the requisite training, violated the dictates of *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). *NLRB v. River City Elevator Co.*, 289 F.3d at 1033. The court concluded: "In the instant case, where representation was decided by one vote and gifts of substantial value were offered by the Union as part of its campaign, we find that laboratory conditions did not exist." Id. (citing *General Shoe*, 77 NLRB 124, 127 (1948).

On October 10, 2002, the Board advised the parties that it had accepted the court's decision and invited the parties to file statements of position. The Union requested that the Board direct a second election; the Employer opposed a second election.

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record, including the parties' statements of position. In light of the court's decision, the sole issue for determination is whether to direct a second election in the underlying representation proceeding, Case 25–RC–9901. For the reasons discussed below, we find that current bargaining unit employees should have the opportunity to resolve the question of their representation by the Union in a second election.

In its statement, the Employer argued that a second election should not be held without a new showing of interest. It contended that (1) the Union's objectionable conduct tainted the original showing of interest and has not been remedied, and (2) the original showing of interest is stale in light of the passage of time since the election and the turnover in the bargaining unit, where only two of the original seven employees remain. We find that the balance of factors weighs against requiring a new showing of interest.

Congress has entrusted the Board with a wide degree of discretion in establishing the procedures and safeguards necessary to ensure employees' free choice in a Board election. *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330–331 (1946).[3] The Board's showing-of-interest requirement represents an exercise of that discretion. Its purpose is to determine initially whether employee sentiment warrants the expenditure of Board resources required to hold an election. *Gaylord Bag Co.*, 313 NLRB 306, 306–307 (1993). It is an intraagency administrative determination, and, as such, is not litigable by the parties. See, e.g., *O .D. Jennings & Co.*, 68 NLRB 516, 517–518 (1946).

It has been the Board's long-held practice to direct a new election if objectionable conduct requires setting aside the results of a prior election. The Employer cites no case, and our research has not disclosed any, involving a *Savair* violation or other objectionable promise of benefit by a union where the Board required a new showing of interest on the theory that the objectionable conduct tainted the original showing of interest. In *Gaylord Bag Co.*, supra, the Board expressly rejected a similar argument based on objectionable *Savair* card solicitations. It distinguished the situation of objectionable union conduct under *Savair* from a situation where "the Board may treat the election as a nullity when an employer has engineered the filing of a decertification petition and thereby abused the Board's electoral processes." Id. (citing *Ron Tirapelli Ford v. NLRB*, 987 F.2d 433, 443 (7th Cir. 1991)).[4]

[1] 333 NLRB No. 67 (not reported in Board volumes).

[2] *NLRB v. River City Elevator Co*., 289 F.3d 1029.

[3] See also *NLRB v. Waterman S.S. Co.*, 309 U.S. 206, 226 (1940), and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969).

[4] Sec. 11028.4 of the Board's Casehandling Manual on Representation Proceedings, cited by the Employer in its brief, refers to *Ron Tirapelli Ford* in support of the proposition that "when the petition itself was tainted by *unfair labor practices* and thus void ab initio, the petition should be dismissed irrespective of the conduct of an election, which is considered a nullity." (Emphasis added.) In the present case there was no allegation, much less a finding, that the Union's conduct amounted to an unfair labor practice.

We also find no merit in the Employer's argument that a second election is inappropriate due to the lapse of time and/or turnover of employees since the petition was filed. The Board has held that these factors do not require a new showing of interest or dismissal of the petition when an election has been set aside because of an employer's objectionable conduct, (see, e.g., *Sheraton Hotel Waterbury*, 316 NLRB 238 (1995)), or a Board agent's objectionable conduct (*Chester Valley, Inc*., 266 NLRB 480 (1983)). We see no reason for a different result when an election has been set aside because of a union's objectionable conduct.

There are several reasons to adhere to the practice of directing another election. First and foremost, once a valid question concerning representation has been raised, we believe that the statutory policy of free choice in the selection of bargaining representative should be afforded maximum expression, by pursuing the process through to its end in a valid election vote by secret ballot. To roll back the representation procedures further than a new election, however, and require another administrative showing of interest, could result in preemption of the employees' statutory right to a Board-conducted secret-ballot election. There is no need or compelling reason to do that.

Second, as previously stated, the 30-percent showing of interest requirement is a purely administrative matter, designed to determine whether enough employees want an election to warrant expenditure of Board's resources. It is not statutorily required,[5] nor is it intended to create a right in any party to protest the conduct of an election. Unquestionably, it is not regarded as proof of the ultimate employee choice on the question concerning representation. See, e.g., *Amos-Thompson Corp.*, 49 NLRB 423, 427 (1943).

Third, it is important to note that continuing the election process even when there has been substantial turnover among employees who initially supported the election petition imposes no hardship on the current workforce. Those employees are properly accorded the opportunity to resolve the ultimate question concerning representation.

Finally, administrative difficulties would be presented if we were to adopt the approach that passage of time and employee turnover require dismissal of the petition unless supported by a new showing of interest. Although the Board does not lightly set aside the results of an election, it is nevertheless sometimes required to do so. The Employer suggests no guidelines or rule of general applicability as to when it would be appropriate for the Board to require a fresh showing of interest. Nor, given the purpose of the requirement, do we readily discern any standards that would guide such an inquiry. In that circumstance, we are persuaded that allowing parties to raise and litigate such questions would be an unwise expenditure of agency resources and cause delay in representation proceedings.

In sum, based on the foregoing reasons, we conclude that the most accurate, fair, and efficient way to resolve the question concerning representation originally raised in this case is simply to continue with the Board's practice of conducting another election without requiring a new showing of interest. This best permits the employees to choose whether they wish to organize or to refrain therefrom.

ORDER

Now, therefore, in view of the foregoing, the National Labor Relations Board orders that the Decision and Order in Case 7–CA–42054 is vacated, and, it is further ordered, that Case 25–RC–9901 is reopened, the election is set aside, and the certification of representative is revoked, and, it is further ordered, that Case 25–RC–9901 be remanded to the Regional Director for Region 25 for the purpose of conducting a second election as directed below.

[Direction of Second Election omitted from publication.]

[5] Sec. 9(c)(1)(A) states only that the Board shall investigate a petition and may order an election "(w)henever a petition shall have been filed . . . alleging that a substantial number of employees" desire union representation in collective bargaining or assert that an incumbent union is no longer a majority representative. See generally *NLRB v. Metro-Truck Body*, 613 F.2d 746, 749–750 (1979). Thus, the statutory language speaks only of a showing of interest upon the filing of a "petition." For as long thereafter as the Board is processing that petition, there is no statutory requirement to repeat or reinvestigate the allegation that "a substantial number of employees" desire, or no longer desire, union representation. The statutory requirement of a new showing of interest would arise only if a new election petition were filed for the same bargaining unit.